INDEX.

	Page.
Supplemental statement	1
Scope and development of litigation before the Commission	4
The litigation in the district court	6
Brief	11
Point I—Proceeding before Commission irregular	11
Point II.—Swift estopped	13
Point III.—Carrier created for self-limited service entitled to capital return under the Fifth Amendment	24
Point IV.—Gulf Company constitutionally entitled to fix rates	46
Point V.—Convertible value of money deprives appellees of property unconstitutionally, if relief granted	63
Point VI.—No authority in Commission to eliminate arbitraries on short lines by enactment of a universal order at July 2, 1919	64

Cases Cited.

Abrams v. Jones, 207 Pac., 727	38
Adkins v. Children's Hospital, U. S. Sup. Ct. Adv. Op., 1923, 440; 24 A. L. R., 1254	21
Akron, C. & Y. R. Co. v. U. S., U. S. Sup. Court Adv. Op., 1923, page 316	41, 64
Akron, etc., v. United States, U. S. Sup. Court Adv. Op., 1923, page 311	44
Armour Packing Co. v. United States, 209 U. S., 80	20
Block v. Hirsh, 256 U. S., 165; 65 L. Ed., 875	36
Bluefield, etc., v. Public Service Commission, U. S. Sup. Court Adv. Op. 1923, page 718	24, 31, 60
Board of Trade v. Abilene, 37 I. C. C., 760	38
Board of Trade v. I. C. R. R., 37 I. C. C., 709	38
Brooks-Scanlon Co. v. Com., 251 U. S., 383	31
Bullock v. R. R. Com., 254 U. S., 520	31
Burrows v. Guest, 4 Utah, 121	12
Cedar Rapids Gas Co. v. Cedar Rapids, 223 U. S., 655, 670	62
Central Railroad of New Jersey v. U. S., 257 U .S., 247	50, 56
Central Yellow Pine Association v. Ill. Cen. R. R. Co., 10 I. C. C., 505	38
Cincinnati, etc., v. Commission, 162 U. S., 197	20
Colley v. Duncan, 47 Ga., 668	12

Page.

Commercial Club v. I. C. R. R., 31 I. C. C., 40..... 38
Commission v. Railroad Company, 209 U. S., 118..... 19
Cotton Mills v. Railroad Company, 84 Miss., 339..... 20
Cybur Lumber Company v. N. O. & N. E. R. R. Co., 43 I. C. C., 271 3
Cypress Company v. Cypress Company, 65 S. E., 827..... 12

Dahn v. United States, 258 U. S., 428..... 39
Des Moines Gas Co. v. Des Moines, 238 U. S., 153, 172..... 62

East Tennessee, etc., v. Commission, 181 U. S., 18..... 21, 50, 52
Electric Co. v. Charlton, 255 U. S., 541..... 31
Elliott on Railroads, section 1500..... 21

Finance Corporation v. Exchange Corporation, U. S. Supreme Court Adv. Op., 1923, page 757..... 60
Fla. East Coast R. R. v. United States, 234 U. S., 167..... 41
Fort Smith v. Ft. Smith, 202 Fed., 590..... 24, 34

Galveston Electric Co. v. Galveston, 258 U. S., 388..... 33
Ga. Ry., etc., v. R. R. Com., U. S. Sup. Ct. Adv. Op., 1923, 730.. 33
Georgia Ry. Co. v. Railroad Commission, U. S. Supreme Court Adv. Op., 1923, 728..... 36
Georgia Railway & Power Company v. Railroad Commission, U. S. Supreme Court Adv. Op., 1923, page 729..... 60

Hammond Lumber Co. v. Commission, 9 A. L. R., 1223; 189 Pac., 639..... 27
Hammond Lumber Company v. Commission, 9 A. L. R., 1123.... 23

Interstate Commerce Commission v. Union Pacific Company, 222 U. S., 541, 547..... 41
I. C. R. R. Co. v. Interstate Commerce Commission, 206 U. S., 441 ..... 33, 37
In re Cameron, 151 S. W., 76..... 38

Kansas City Sou. R. R. Co. v. U. S., 231 U. S., 423..... 31
Knoxville v. Knoxville Water Works Co., 212 U. S., 14..... 31
Kwock Jan Fat v. White, 253 U. S., 415, 454, 465; 64 L. Ed., 1010, 1015; 40 Sup. Ct. Rep., 566..... 11, 37

Landon v. Commission, 234 Fed., 161..... 34
League v. Railroad Company, Ann. Cas. 1914 A, 1161..... 24, 34
Lee v. Newman, 55 Miss., 365..... 15
Lincoln Gas, etc., Co. v. Lincoln, 250 U. S., 256, 268..... 62
London v. Commonwealth, 234 Fed., 161..... 24

	Page.
Lowrey v. Hawaii, 206 U. S., 222; 51 L. Ed., 1033	17
Lumber Company v. Cypress Co., 66 S. E., 116	12
Lumber Rates Fourth Section Application, 25 I. C. C., 50	38
Mercantile Lumber Company v. I. C. R. R. Co., 53 I. C. C., 688	52
Missouri ex rel. v. Public Service Com., 1923 U. S. Sup. Ct. Adv. Op., 623	32
Missouri Railroad Company v. Ault, 256 U. S., 554	39
N G Fung Ho v. White, 259 U. S., 284	11, 37
Northern Pacific R. R. v. North Dakota, 250 U. S., 135	39
Paducah Case, 245 U. S., 136	57
Philadelphia & Reading Co. v. United States, 240 U. S., 334	50, 53
Railroad Company v. Ellis, 165 U. S., 154	60
Rates on Lumber from Southern Points, Investigation & Suspension Docket, 520; 34 I. C. C., 652; Sup. Rep. 36 I. C. C., 137	38
R. R. Co. v. Mills, 253 U. S., 208	31
Richmond Switching Case, 254 U. S., 57, 62	57
St. Louis S. W. R. R. Co. v. U. S., 245 U. S., 136	50
Seaboard Air Line Ry. Co. v. U. S., 254 U. S., 57	50
Smythe v. Ames, 169 U. S., 466	36
Southern Pacific Co. v. Commission, 219 U. S., 433	64
Southern R. Co. v. Tift, 306 U. S., 428	37
Southern Pacific Company v. Interstate Commerce Commission, 219 U. S., 443	13
Summerbell v. Summerbell, 38 N. J. Eq., 293	12
Texas, etc., v. Com., 162 U. S., 197	50
Tindall v. Mills Company, 67 S. E., 908	12
U. S. v. L. & N. R. R. Co., 235 U. S., 320	50
Vandalia R. R. v. Schnull, 255 U. S., 120	31
Watts v. Buchanan, 92 Miss., 544	48
Weems Steamboat Co. v. People's Steamboat Co., 214 U. S., 345	58
Werlien v. New Orleans, 177 U. S., 403	12
Wilcox v. Consolidated Gas Company, 212 U. S., 19, 48-50	62
Wolf Packing Company v. Court of Industrial Relations, U. S. Sup. Court Adv. Op., 1923, page 758	21
Wolf Packing Company Case, supra, at page 760	22
52 L. R. A. (N. S.), 15	33
29 C. J., 284	11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 40.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS.

vs.

ILLINOIS CENTRAL RAILROAD COMPANY ET AL., APPELLEES.

BRIEF FOR APPELLEE FERNWOOD, COLUMBIA & GULF RAILROAD COMPANY.

Supplemental Statement.

Appellants' statement of the case needs be supplemented to accurately reflect appellee's contentions.

Originally, the Fernwood Lumber Company owned a saw mill at Fernwood, on the Illinois Central Railroad (hereinafter called "Central Company"), and acquired for milling thereat, an extensive tract of timber. To log the mill, a

railroad was constructed, as needed, from time to time, which subsequently developed into a chartered carrier, this appellee, Fernwood, Columbia & Gulf Railroad Company (hereinafter called "Gulf Company"), and in 1914, it was, by order of the Interstate Commerce Commission, eliminated from the class of a plant facility.

Until 1906, it uniformly exacted, for all lumber transported, a local rate of 5 cents per 100 pounds. In 1906, the present rate structure was initiated; the Gulf Company then named, and thereafter consistently collected, an arbitrary, for itself, of 2 cents over the junction- int rate out of which it also received a division on all traffic.

Prior to 1912, Swift Lumber Company (hereinafter called "Swift"), purchased from the Fernwood Lumber Company a portion of said timber, and covenanted with that company:

> "* * * For and in consideration of the sum of One Dollar ($1.00) cash in hand paid, the receipt whereof is hereby acknowledged and certain conditions, as hereinafter recited, the Fernwood Lumber Company * * * did lease unto the Swift Lumber Company, their successors or assigns * * * (certain real property)."

The conditions heretofore referred to are that "Swift Lumber Company, their successors or assigns, shall deliver to the Fernwood & Gulf Railroad Company all and singular the freight tonnage originating on and tributary to the logging railroad of the Swift Lumber Company. * * *" Tr., II; O. R., 331 (Commission's Brief, Appendix A).

Swift's only witness, Kimball, testified:

> "Q. Now is it not a fact that when you went to locate your mill at Knoxo, that the question of this

> additional rate via the Fernwood & Gulf was under discussion with the persons of whom you purchased the timber, and of whom you obtained your mill site, and that you made a written agreement with them by which you obtained your mill site and agreed as a part of the consideration to let your timber move over the Fernwood & Gulf Railroad?
>
> A. That is a fact. * * *"
>
> (Tr. 55.)

At that time the New Orleans Great Northern Railroad was at Tylertown, whereat the trunk line rate was effective. Nevertheless, Swift knowingly located at Knoxo, and, under this covenant, moved the tonnage over the Gulf Company for many years without protest. Only when over 80 per cent thereof had been so paid on, did Swift, on the suggestion of an outsider, endeavor to repudiate the covenant; hence the law suit whereof Kimball said:

> "We were informed by one of our customers that his traffic man informed him that this 2-cent arbitrary which we had been paying for a number of years was illegal, I think, was the term he used. However, I don't intend to accuse the Fernwood & Gulf Railroad of illegal practices, but he said it could be set aside." (Tr., 60.)

This rate structure had been long effective and was well known to the Interstate Commerce Commission. In *Cybur Lumber Company v. N. O. & N. E. R. R. Co.*, 43 I. C. C., 271, it was said:

> "The rates on lumber from stations on the Fernwood & Gulf Railroad * * * are made by the addition of an arbitrary of from one to two cents to

the rate from the junction point." *Cleveland Lumber Company v. A. C. L. R. R. Co.,* 52 I. C. C., 158; elsewhere *Lewis v. Railroad Company,* 47 I. C. C., 80; Shepherd testifies (Tr., 80 et seq.; Exs. 3 & 4), all timber tonnage from some short lines on the Central has now moved, nearly all of it from others, all without protest.

Scope and Development of Litigation Before the Commission.

On July 2, 1919, Swift filed petition (Tr., 18) against Walker D. Hines, Director General, making the controlled lines "formal parties defendant hereto" (Tr., 21), and original defendants, also the non-controlled lines. The Director General filed a general denial, but among other things, of General Order No. 28, said:

> "He avers it is therein by him found and certified to this honorable commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit, it was necessary to increase the railway operating revenue; also that in his opinion the public interest required a general advance in freight rates * * *; and he further avers that all rates as now in force and complained of herein have been established pursuant to and in accordance with said order" (Tr., 29).

The Gulf Company answered at length (Tr., 29-35), setting up, in addition to a general denial: (*a*) Estoppel; (*b*)

a constitutional right to capital return, and (*c*) an individual power of rate fixation coördinated with its own best interests.

The hearing occurred in Chicago, December 18-19 before Honorable J. Edgar Smith, Special Examiner; the evidence thereat appears in Tr., 36-137; and the examiner's report at Tr., 137, wherein, after personal contact with the witnesses, he recommended to the Commission to dismiss the petition, (Tr., 144), finding: (*a*) The rate reasonable, under Section 1; (*b*) non-discriminatory, under Section 3; and (*c*) denying reparation.

The cause was then argued, on exceptions filed by both sides, before Commissioners Hall, Daniels, and Woolley, May 15, 1920; the Commission being then full. The cause, however, was not decided until April 5, 1911, when Commissioner Woolley had retired and two vacancies existed; only five Commissioners concurred in the majority opinion wherefrom three Commissioners, including Commissioners Hall and Daniels dissented; Commissioner Esch did not participate—in short, eleven months after submission by a majority of five to three, this order herein sought to be enforced was entered when three of the Commission concurred with the Special Examiner holding relief inappropriate.

The hearing was during Government control; thereat it appeared that the Railroad Administration had adopted the policy of requiring short lines to plus the rates set forth thus (Tr., 98):

> "However, since the N. O. & N. E. has been under Government control, the Administration has reached the conclusion that this road should be treated the same as other short roads in the southern region—that is, by making the maximum shrinkage as pro-

vided in the Commission's tap-line decision—*and if that road feels that it is entitled to greater revenue it should obtain same by adding to the junction-point rate such arbitrary as it considers proper.*" (Italics ours.) The Commission unanimously found the rate reasonable under Section 1; and the sole basis of the majority opinion was alleged discrimination under Section 3. Petition for reargument was promptly filed and overruled.

The Litigation in the District Court.

Parties: Original Complainants and Appellees, Central Company and Gulf Company; Sole Original Defendant, United States; Intervenors, Interstate Commerce Commission and Swift Lumber Company; Appellants, United States and Interstate Commerce Commission. Swift has not filed any bond.

The Original Bill and Exhibits, Tr., 1-158. This bill delineates the proceedings and attacks the order:

I.—THE PROCEEDINGS BEFORE THE COMMISSION WERE IRREGULAR IN THIS, THAT AS AN ADMINISTRATIVE BODY, THE HEARING AFFORDED DID NOT ACCORD WITH LAW (Tr., 6 and 7, Secs. IX and X), whereof, under Point I:

II.—AN ESTOPPEL EXISTED AGAINST SWIFT UNDER EXPRESS CONTRACT ASSENTING TO THE RATE STRUCTURE CONTAINING THIS ARBITRARY (Tr., 7, Secs. XI, et seq.), whereof under Point II:

III.—THE GULF COMPANY WAS CONSTRUCTED SOLELY TO MARKET TIMBER FROM ADJACENT TERRITORY; ITS TIMBER TONNAGE IS 93 PER CENT AND WHEN REMOVED, ITS REASON FOR BEING SHALL CEASE.

Said company has outstanding $500,000.00 First Mortgage Bonds, $200,000.00 Refunding Mortgage Bonds (lawfully authorized under the provisions of the Transportation Act of 1920), $100,000.00 of capital stock (whereon no distribution of any kind has ever been made), all invested in a property solely utilized, substantially, in timber transportation, and whereon it is entitled to such rates as will fairly compensate it for service rendered and make a return of the capital so invested, valued by the valuation section at nearly $600,000.00.

"To ignore this principle would be to violate the Fifth Amendment and no public service corporation can be expected to sacrifice its property for public use without compensation therefor made, and it is entitled to earn not only what will meet current repairs, but to provide a means of replacement when it ceases to be of value" (Tr., 9). In a self-limited operation of a railroad, the carrier has a right to exact under the Fifth Amendment a capital reserve against and from the resource for the removal whereof construction was had (Tr., 8, 9, 10, Secs. XI, et seq.), whereof later under Point III:

IV.—THE GULF COMPANY SETS FORTH ITS RIGHT TO FIX RATES; ITS FIXATION OF THEM LAWFUL FOR DIVERS REASONS, AMONG OTHERS:

(*a*) The original exaction of the full local for the service until 1906 when the through rate was first established, the service being that substantially rendered in bringing to a main line carrier tonnage located at a distance therefrom (Tr., 10);

(*b*) The existence of a territory accurately admeasured wherein Knoxo was located, wherefrom there had never been a trunk line rate on a branch road, but a continuous plussing thereof (Tr., 11);

(*c*) No deviation by the Gulf Company in plussing, save, when previously thereto, therein duly authorized, by the Commission, and then only to the extent thus prescribed (Tr., 12, et seq.);

(*d*) Confiscation, contrary to Fifth Amendment;

(*e*) The inherent right as an individual railroad peculiarly situated to name its rates (Tr., 12, et seq.), whereof under Point IV;

V. "Complainants aver that for the service rendered in the transportation of lumber at the present rates, with the convertible value of money, that the rate upon lumber is lower, and to further reduce it by the elimination of the arbitrary would be to deprive complainants of their property contrary to the Fifth Amendment," whereof under Point V;

VI. Complainants aver that the Commission is here seeking to create a general elimination of individual action by short carriers, and seeking to control the rate structure, by methods outside of the power of the Commission; whereof under Point VI.

The exhibits were in large measure omitted from the printed transcript, but Exhibit A (Tr., 18) is the original petition before the Commission. Exhibit C is the testimony before the Commission which was brought into the bill thus: "Direct reference to said evidence is specifically made and

the same integrated into this bill by reference, and is not set forth at length merely to save prolixity" (Tr., 5).

Thereupon, Holmes, District Judge, being absent, Rufus E. Foster, District Judge of Louisiana, having been designated to act, a motion was properly made for a preliminary injunction (Tr., 159), which was heard before a Court composed of R. W. Walker, Circuit Judge, Wm. I. Grubb and Rufus E. Foster, District Judges, at Birmingham, Alabama, on August 18, 1921.

There the United States, the sole original defendant, filed a motion to dismiss, predicated, substantially, upon the grounds hereinafter set forth (Tr., 163). The Commission intervened, and its answer, save upon the number of Commissioners, is, substantially, a motion to dismiss, and was treated as such (Tr., 164). Swift intervened, and moved to dismiss (Tr., 166). A preliminary injunction was granted at Birmingham (Tr., 167), and issued August 19, 1921 (Tr., 169). The cause was next heard at New Orleans, under due proceedings, upon February 13, 1922, whereat it was disposed of by final decree thus:

(1). The motion of the United States to dismiss was again overruled, and leave to plead further not being asked, the cause was submitted for final decree, and as to the United States, it was set forth that complainants were entitled to relief.

(2). As to the Commission, its answer, save as herein indicated, was treated "as its motion to dismiss, which is hereby disallowed and overruled, leave to plead further not being asked, and said cause being ready for final decision, the relief hereinafter set forth is to be granted."

(3). The intervention of Swift was dismissed, and relief granted (Tr., 180).

This course was pursued because, substantially, there was and is no conflict in the evidence. From this decree, the cause comes here, and to affirm it, we submit:

POINT I. PROCEEDING BEFORE COMMISSION IRREGULAR;

POINT II. ESTOPPEL AGAINST SWIFT;

POINT III. CARRIER CREATED FOR SELF-LIMITED SERVICE ENTITLED TO CAPITAL RETURN UNDER 5TH AMENDMENT;

POINT IV. GULF COMPANY CONSTITUTIONALLY ENTITLED TO FIX RATES;

POINT V. CONVERTIBLE VALUE OF MONEY DEPRIVES APPELLEES OF PROPERTY UNCONSTITUTIONALLY, IF RELIEF GRANTED;

POINT VI. NO AUTHORITY IN COMMISSION TO ELIMINATE ARBITRARIES ON SHORT LINES BY ENACTMENT OF A UNIVERSAL ORDER.

BRIEF.

Point I.

PROCEEDING BEFORE COMMISSION IRREGULAR.

When this cause was submitted, May 15, 1920, the Commission was full; the cause was not decided until April 5, 1921, eleven months thereafter, during which time vacancies intervened, Commissioner Woolley, before whom argument was made, had retired, the two Commissioners who heard the argument dissented.

This cause is of the utmost importance; its principles destroy practices existing for years, formulated by the owners of property. Under it, their property is to be taken, their earnings reduced and a policy established abhorrent to their best interests, and contrary to that adopted by the Railroad Administration under similar circumstances (Tr., 98, 110-112).

By amended Section 17, the Act to Regulate Commerce provides: "Any person may appear before the Commission or any division thereof and be heard in person or by attorney." With this fundamental right to be heard, what did the law require of the Commission, when the only two members who heard the cause argued were unwilling to promulgate this order? 29 *C. J.*, 284, holds:

> "A hearing consists in receiving facts and the argument thereon for the purpose of correctly deciding."

Where the hearing given by an administrative body is not full and fair, this Court annuls. *Kwock Jan Fat v. White,* 253 U. S., 415, 465; *N G Fung Ho v. White,* 259 U. S., 284.

Where there was such a division between those who heard the argument and those who had not, was it competent for those who had not, by deciding as was done here, to deny to the appellee the right to be heard?

Here, especially, where one member retires, as did Commissioner Woolley, the Court must remand for reargument. *Lumber Company v. Cypress Co.*, 66 S. E., 116, holds:

> "Where a case on appeal to the Supreme Court is heard by a Court composed of four members and before the case is decided one of the Justices goes off of the Court and two of the remaining Justices are in favor of reversal and the other for affirmance, a rehearing will be ordered."

Cypress Company v. Cypress Company, 65 S. E., 827;
Tindall v. Mills Company, 67 S. E., 908;
Summerbell v. Summerbell, 38 N. J. Eq., 293;
Burrows v. Guest, 4 Utah, 121;
Colley v. Duncan, 47 Ga., 668.

The uniform rule of this Court is that its members who have not heard the argument of the case do not participate in its decision: *Werlien v. New Orleans*, 177 U. S., 403; *Shoshone Min. Co. v. Rutter, Id.*, 514; *Cin., H. & P. R. Co. v. Thiebaud, Id.*, 621, and many other cases.

Counsel contend the reduction of our argument to writing and its submission, along with the record, negatives the error; not so. If it be competent to take away the right of *personal contact* between parties with courts, the constitutional guaranty has become a mockery, the Star Chamber has returned. Where there is such sharp division of opinion, the right to be heard by oral argument by the Commis-

sion, as a Commission, is, with deference, required by the Act. Those who heard, condemned us not, while those who had not heard us, condemned us, and when this occurred, of necessity, a right to be heard by those who condemned us was a condition precedent to their right of condemnation.

Into what disrespect will law fall when the right to personally appear is denied, especially, when those judges before whom we have appeared dissent? The duty to make the law above reproach rests here. This rule should be here applied, especially because the Commission appears to have been promulgating a general policy, under the influence of prior decisions, rather than deciding our case. The Commission sought to do that which was condemned in *Southern Pacific Company v. Interstate Commerce Commission,* 219 U. S., 443. This proceeding was not under Section 15 and is only under Section 3. Appellees were not given the right personally to differentiate this case from those under which the majority was then acting. The injustice is so manifest as to be reflected in the result.

Point II.

Swift Estopped.

The motion to dismiss admits—

> "Swift Lumber Company located its plant upon the line of the Fernwood Company when the same was the property of the Fernwood Lumber Company, and thereafter when a segregation occurred by which said Lumber Company was divested from the Railroad Company, the Railroad Company, by virtue of such

diversion, became entitled to have, demand and exact that the Swift Lumber Company should do and perform its certain covenant and contract whereby it undertook and agreed to ship all of its output over said Fernwood line at rates then in effect, embracing and including said arbitrary, and that in consideration of such agreement, as appears by the exhibits to said evidence so taken, said Lumber Company received valuable rights-of-way and other property in virtue of which it is now enjoying its facilities, and which, but for its contract so thus to remove its tonnage, it would not have been allowed to become the owner of."

To demonstrate that these legally admitted averments were predicated upon full warrant, Swift introduced but one witness who swore that he knew that the rate at Knoxo was two cents higher than at Tylertown (Tr., 47):

"Did Tylertown, at the time you located your mill at Knoxo, take a rate 2 cents lower than the rate from Knoxo?

"A. Yes."

Again:

"Q. I will ask you, Mr. Kimball, to state when you went to locate your mill at Knoxo, Mississippi, weren't you familiar with the fact that this arbitrary was in existence, and that at Tylertown, at that particular time, * * * there was no arbitrary?

"A. I was familiar with that. * * *

"Q. And if your location had been upon the N. O. G. N. road, you were aware that by so locating, you would have enjoyed the benefit of the grouping rate applicable to this section?

"A. We knew that. I knew that.

"Q. Now, is it not a fact that when you went to locate your mill at Knoxo, that the question of this additional rate via the Fernwood & Gulf was under discussion with the persons of whom you purchased the timber, and of whom you obtained your mill site, and that you made a written agreement with them by which you obtained your mill site and agreed as a part of the consideration, to let your timber move over the Fernwood & Gulf Railroad?

"A. That is a fact" * * * (Tr., 55).

The Gulf Company was extended later into Columbia. This contract was made:

> "For and in consideration of the sum of one dollar ($1.00) cash in hand paid, the receipt whereof is hereby acknowledged, and certain conditions as hereinafter recited, the Fernwood Lumber Company * * * doth lease unto the Swift Lumber Company, their successors or assigns" * * * (certain property).

The covenant recited:

> "The conditions heretofore referred to are: That Swift Lumber Company, their successors or assigns shall deliver to the Fernwood & Gulf Railroad Company all and singular the freight tonnage originating on or tributary to the logging railroad of the Swift Lumber Company that may be offered and destined to a point upon said logging railroad or any extensions thereof."

The other conditions are largely immaterial.

A contract so made for another's benefit in Mississippi is by him legally enforceable (*Lee v. Newman*, 55 Miss., 365),

especially where, as here, at that date the promisee was a subsidiary of the party paying the consideration.

Opposite counsel quote the contract and seek to avoid it because there was "nothing said in the contract about rates." But, note the record:

> "The question of this additional rate via the Fernwood & Gulf was under discussion with the persons of whom you purchased the timber and of whom you obtained your mill site and that you made a written agreement with them by which you obtained your mill site and agreed, as a part of the consideration, to let your timber move over the Fernwood & Gulf Railroad?
>
> "A. That is a fact" * * * (Tr., 55).

Let us individualize. On the one side, there was Swift, the purchaser; on the other, Enochs, the owner of the railroad and the timber, and of those rights Swift desired to become the lessee. Therefore, when there had been a discussion of this arbitrary, a covenant for removal was made, obligating Swift to route via the line whereover the arbitrary obtained. Had it not been the intention that this should so be, and that therefrom Enochs would have derived a profit, no such consideration would have arisen. One dollar recited is not a consideration for the grant of the rights herein mentioned and of which Swift has been in possession.

For nearly ten years Swift paid this arbitrary and raised no question, not even knowing that he was being discriminated against, and we therefore insist:

(*a*) Looking to the facts and circumstances, *i. e.*, the payment, the lower court found, under the motion to dismiss, a covenant to ship at the published rate, containing this ar-

bitrary, the admeasurement of compensation being the rate then in effect. The service could not be given; compensation must have been in their minds, and when, for nearly ten years, that compensation was admeasured upon a fixed basis, it is difficult not to perceive that the payment of the arbitrary constituted the consideration moving to the Lumber Company.

The trunk line rate was in effect from Tylertown, six miles distant, and this provision was a covenant to pay that which was paid. Acquiescence in the exercise of the right, without question, estops now Swift from assailing it. Where there has been, for a period of over six years, a uniform interpretation placed upon a contract by the parties thereto by performance, such interpretation becomes the measure of the rights thereunder. In *Lowrey v. Hawaii,* 206 U. S., 222; 51 L. Ed., 1033, it was said:

> "In *Brooklyn L. Ins. Co. v. Dutcher,* 95 U. S., 269; 24 L. Ed., 410, it was said: 'There is no surer way to find out what parties meant than to see what they have done.' So obvious and potent a principle hardly needs the repetition it has received. And equally obvious and potent is a resort to the circumstances and conditions which preceded a contract. Necessarily in such circumstances and conditions will be found the inducement to the contract and a test of its purposes. The conventions of parties may change such circumstances and conditions, or continue them, but it cannot be separated from them. And this makes the value of contemporaneous construction. * * * It is of greater value to explain a contract where self-interest is quick to discern the extent of rights or obligations, and never yield more than the written or spoken word requires. See, for further illustration,

the following: *Ree v. Merchants' Mut. Ins. Co.,* 95 U. S. 23; 24 L. Ed., 348; *District of Columbia v. Gallaher,* 124 U. S., 505; 31 L. Ed., 523; 8 Sup. Ct. Rep., 585; *Topliff v. Topliff,* 122 U. S., 121; 30 L. Ed., 1110; 7 Sup. Ct. Rep., 1057; *Paige v. Banks,* 13 Wall., 608; 20 L. Ed., 709; *Philadelphia, W. & B. R. Co. v. Trimble,* 10 Wall., 367; 10 L. Ed., 948; *Chicago v. Sheldon,* 9 Wall., 50; 19 L. Ed., 594; *Cavazos v. Trevino,* 6 Wall., 773; 18 L. Ed., 813; *Simpson v. United States,* 199 U. S., 397, 399; 50 L. Ed., 245, 246; 26 Sup. Ct. Rep., 54; *Chicago Great Western R. Co. v. Northern P. R. Co.,* 42 C. C. A., 25; 101 Fed., 792. And many State cases could be cited." 13 *C. J.,* 546; *Candler v. Cromwell,* 101 Miss., 161.

Thus, when so construed by the parties, their construction becomes conclusive of the rights thereunder especially when, in virtue thereof, the party testified:

> "Q. So you have a 2-cent arbitrary constantly brought home to you, in other words? A. It always has to be taken into consideration. In writing letters to prospective customers who are not familiar with the conditions on our line, I make it a practice to call attention to the fact that we have a 2-cent arbitrary over the main line rate."

And while witness testifies to some confusion with reference thereto, initially he clears it up thus:

> "Q. In other words, as I understand your testimony, you were having considerable difficulty in moving your tonnage by reason of these arbitraries on the rate, and there were discussions of it, and I wanted to fix the date of those discussions." * * *
>
> "The Witness: I understand the gentleman now. These transactions occurred back in 1913 and 1914.

"Q. Since 1913 and 1914, as I understand it, you have not had any of that kind of trouble.

"A. I have taken occasion to explain our position of being under a 2-cent arbitrary and have advised them of that fact in making our quotations except, of course, those with whom we were doing business regularly and who understood conditions.

"Q. That condition obtained back in 1913 and 1914 and has not caused any friction since that date, as the parties to it understood what you were doing? A. Yes, sir; that is true."

With this admission of the basis for fixing the prices of lumber sold, all doubt as to the interpretation of the contract ends.

(*b*) But, as said in *Commission v. Railroad Company,* 209 U. S., 118:

> "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet in no proper sense is the public a general manager. As said in *Interstate Commerce Commission v. Alabama Midland R. Co.,* 168 U. S., 144; 42 L. Ed., 414, 425; 18 Sup. Ct. Rep., 45, 51, quoting from the opinion in 5 Inters. Com. Rep., 697; 21 C. C. A., 59; 41 U. S. App., 466; 74 Fed., 723:
>
> " 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate com-

merce leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interest upon the same principles which are regarded as sound and adopted in other trades and pursuits.'

"It follows that railroad companies may contract with shippers for a single transportation or for successive transportations, subject though it may be to change of rates in the manner provided in the interstate commerce act (*Armour Packing Co. v. United States,* 209 U. S., 56; *ante,* 781; 28 Sup. Ct. Rep., 428), and also that in fixing their own rates, they may take into account competition with other carriers, provided only that the competition is genuine and not a pretense."

That such a contract is requisite, see *Cotton Mills v. Railroad Company,* 84 Miss., 339.

Where the rate is published in accordance with law, a contract to ship tonnage under a rate so published is valid. *Armour Packing Co. v. United States,* 209 U. S., 80.

This principle is established by *Cincinnati, etc., v. Commission,* 162 U. S., 197, where it is said:

"We prefer to adopt the view expressed by the late Justice Jackson when circuit judge, in the case of *Interstate Commerce Commission v. Baltimore & O. R. R. Co.,* 43 Fed. Rep., 37; 3 Inters. Com. Rep., 92, and whose judgment was affirmed by this court, 145 U. S., 263; 4 Inters. Com. Rep., 92, just quoted * * *.

See, *Elliott on Railroads,* section 1500:

> "Amount of Compensation.—The general rule is that a common carrier is bound to carry for all for a reasonable compensation, or, as is sometimes said, at a reasonable rate. The fact that some one else is charged less for a similar service may be evidence tending to show that a charge is unreasonable, but it would seem that 'charging another person too little is not charging you too much,' and that it does not necessarily follow that the rate is unreasonable merely from the fact that some one else is given a lower rate. * * * In such case if the rate has been fixed by a lawful contract, it must of course prevail, and the shipper has no other outlet, and the carrier demands and forces him to pay a higher rate than that agreed upon, the shipper may nevertheless ship his goods and recover back the excess of freight above the contract price."

See, also, *East Tennessee, etc. v. Commission,* 181 U. S., 18.

As said in *Wolf Packing Company v. Court of Industrial Relations,* U. S. Sup. Court, Adv. Op., 1923, page 758:

> "While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, it must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins v. Childrens' Hospital,* decided April 9, 1923 (— U. S., —; *ante,* 440; 24 A. L. R., 1238; 43 Sup. Ct. Rep., 934)."

In *Adkins v. Children's Hospital,* — U. S. Sup. Ct., Adv. Op., 1923, 440, 24 A. L. R., 1254, it was held:

> "To sustain the individual freedom of action contemplated by the Constitution is not to strike down the common good but to exalt it; for surely the good of society as a whole cannot be better served than by the preservation against arbitrary restraints of the liberties of its constituent members."

The property devoted to public use does not become of public ownership. It is violative of the Constitution to vest in the Commission the right to admeasure discrimination not by what we do, but by what our competitors do. It stands adjudged in this case that the rate charged is reasonable in and of itself.

The fixation by the Gulf Company of this rate, in virtue of its charter powers, was lawful; but it is contended that it became unlawful because another, under different circumstances, under a different charter, actuated by different motives, saw fit to name a lower rate.

Wolf Packing Company Case, supra, at page 760, says:

> "First fully recognized by this Court in *Munn v. Ill.*, 94 U. S., 113, where it is said (p. 126): 'Property does become clothed with the public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. *He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.*"

So, when the party knows the rate, and such rate is established, a contract to pay the published rate is valid. Thereunder, there can be no complaint by the party receiving the consideration under the third section, because such party consenting cannot complain.

Section 3, claimed to be violated, provides:

> "That it shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

When Swift, voluntarily, agreed to move this tonnage at the published rate, knowing that rate to be higher than the rate at Tylertown, upon full and adequate consideration, he cannot complain that this so thus by him done is unlawful—a crime—wherefor a penalty would be inflicted, because a person injured can determine the extent of the undue prejudice, and when he consents thereto, he cannot say that it was undue. So that, the contract so thus made for shipment at the published rates, was valid.

(c) But if no rate was contemplated by either party when the contract was made, the law would supply a reasonable rate; such a rate to be paid a carrier whose life is limited by timber removal must be greater than that appertaining to a carrier whose life is not so limited, and integrated into such a rate, must be compensation to retire capitalization. *Hammond Lumber Company v. Commission,* 9 A. L. R., 1123;

League v. Railroad Company, Ann. Cas. 1914 A, 1161; *Fort Smith Co. v. Fort Smith,* 202 Fed., 590; *London v. Commonwealth,* 234 Fed., 161.

As pointed out in *Bluefield, etc. v. Public Service Commission,* U. S. Sup. Court Adv. Op., 1923, page 718:

> "Consideration must be given to the nature of the investment, a higher rate being regarded as justified by the risks incident to a hazardous investment."

Naught could be more hazardous than an investment of this character when, at the termination of the service, the plant must be junked.

Point III.

Carrier Created for Self-limited Service Entitled to Capital Return under the Fifth Amendment.

The Gulf Company was originally a plant facility of the Fernwood Lumber Company constructed for the removal of the timber by it owned. So that, had this ownership remained, no profit could have been realized by the Lumber Company until the cost of the Railroad had been amortized by charges continuously made against each unit of timber removed. However, the Gulf Company became disassociated from the Lumber Company, but disassociation did not change its character. Even with the arbitrary, it is now and has been operating at a serious loss. Timber composes 93 per cent of its traffic; within a time definitely fixed by the witnesses, this will be exhausted. The ground of no cause of action admitted all well pleaded facts, and among the facts so pleaded is its demise commercially, due to timber

exhaustion. So that, of record, this admission is judicially made, and made advisedly, because thereof, in the opinion of the majority, Commissioner Eastman declared (Tr., 150):

> "It is suggested that the independent short lines are likely to be abandoned with the depletion of the timber areas; but this is mere speculation."

So that the position which must be sustained is this, namely. When a carrier is constructed for the removal of specified, particularized tonnage, whose removal covers a limited period, such carrier cannot integrate into its rate structure, an arbitrary in addition to permanent railroad rates to retire capitalization at the end of operation because short lines may not be abandoned! Note the Commission did not say that this short line would not be; on the contrary, it dealt with a general principle, and dealing with a general principle, sought to apply that to this case; but in the declaration that hazard should not find expression in compensation, the Commission contravenes the holding in *Bluefields, etc. v. Public Service Corporation,* U. S. Sup. Court Adv. Op., 1923, page 718, declaring:

> "Consideration must be given to the nature of the investment, a higher rate being regarded as justified by the risk incident to a hazardous investment."

The nature of the investment therefore admeasures reasonable compensation; that is controlling here.

This case involves the very existence of short line railroads where they have a limited service period, namely: Lumber roads, coal roads, mining roads, etc. Their financial welfare is conditioned upon an adequate revenue return based upon

a constitutional operation of the limitations incident. This principle has been by the Commission ignored.

Initially this line was a plant facility, for the removal of the timber on the Swift tract, along with other company timber; as a plant facility, against each unit of timber, when removed, there must needs have been accounted the proportionate cost incident to this railway construction. The Fernwood Lumber Company could never have made a profit, nor correctly kept its accounts, had it not, against *each timber unit* removed, charged the proportionate cost of railroad construction, so that when all timber had been cut, there would be returned to those investing, the cost of the railroad constructed along with other capital realization. The policy pursued by the Department of Internal Revenue in the Timber Questionnaire specifically demonstrates the point. There must needs be replacement of the capital invested in this railroad (less junk value) before a profit can be realized. It is not unjust to exact of those who enjoy the fruits arising from this railroad line that they be called to pay the cost accruing.

After construction of the line by Fernwood Lumber Company, a portion of its timber was sold, while the Gulf Company was still in the plant facility Tap Line class, and the covenant as to removal was made expressly by it. Thereafter, the Gulf Company ceased to be a tap line; became an independent carrier, but the change in the form of its property ownership did not in any way vary its fundamental character of service, nor the amounts which were requisite to be realized from timber tonnage towards capital retirement. The fact that it had become a public service corporation in nowise relieved those who would use it, as such,

from making compensation to its owners commensurate with the character of the service rendered. Yet, notwithstanding, the Commission disregarded this contention, though the construction for this purpose was admitted. Had the Fernwood Lumber Company continued to be the owner of this timber, and utilized, as was requisite, this road for its removal, although a chartered carrier and the ownership was widened by stocks and bonds the entire cost of this road, less its junk value, must needs have been charged against operation, though so induced. Therefore, when other parties—the general public—became the owners of the securities of this carrier, created specifically for the removal of transitory timber tonnage, fixed in amount, it was requisite that those who should so utilize it should contribute, from each timber unit removed, the cost proportion properly allocatable from road construction, so that when all timber was removed, there would be a capital replacement commensurate with the original investment.

The tonnage to be removed is fixed, is temporary, and when removal is complete, the public service will be ended. Swift demanded removal of this tonnage, and demanding removal of it to the mainline carrier, cannot, with deference, exact the performance of this obligation without making a contribution to the short-line carrier adequate to compensate it for the service rendered. In *Hammond Lumber Co. v. Commission*, 9 A. L. R., 1223; 189 Pac., 639, Mr. Justice Burnett said:

> "The principal grievance voiced by the plaintiffs is that the Commission considered as one of the elements, in making up the rates which the railroad company was entitled to charge, the amortization of

the reasonable value of the plant of the company, and, as incidental to that, reckoned the discount upon the bonds of the company which it sold at 5 per cent less than par to obtain funds with which to build the road. It is contended by plaintiffs that all the shipper is required to pay is for carriage of its products a sufficient amount to cover a reasonable rate of interest on the value of the plant employed in the carriage. For the defendant it is maintained that the company, as time goes on, is entitled to charge such a rate as will not only afford a fair return of interest on the value of the plant, but will provide for and absorb the depreciation of the property under all the circumstances of the particular case. The carrier devotes its private property to public service, but it is none the less on that account within the protection of the Constitution that such property shall not be taken for public use, nor the particular services of any man demanded, without just compensation. Or. Const., art. 1, sect. 18. Thus to devote its property means that it gives to the public the right or option to demand its service or the use of its property, but this is always subject to the condition of just compensation. Neither the public nor any of its component parts is compelled to exercise this right or option, but, if it is exercised, it can be only under the attendant constitutional condition. It is said that a shipper should not be compelled to buy the company's railroad. But it is equally true in principle that the company is entitled to such rates as will fairly compensate it for the service rendered, and for depreciation of its plant employed in such service, even though it reaches the vanishing point. In other words, the company ought to be allowed to come out even, in an undertaking which may reasonably be expected to exhaust itself, and, besides

quitting whole, to receive a fair compensation for its services. The carrier ought not to be compelled to sacrifice its plant, and be content merely with compensation amounting only to interest on its value. To ignore this principle would be to violate the constitutional inhibition already quoted. A public service corporation cannot be expected to sacrifice its property for the public good. Nor is it bound to see its property gradually wasted by wear and decay, without making provision for its replacement. It is entitled to earn enough not only to meet the expenses of current repairs, but also to provide means for replacing the parts of the plant when these can no longer be used. *Cedar Rapids Gaslight Co. v. Cedar Rapids,* 144 Iowa, 426; 48 L. R. A. (N. S.), 1025; 138 Am. St. Rep., 299; 120 N. W., 936. The whole subject involved in this litigation is ably and exhaustively treated in the note to *Kansas City Southern R. Co. v. United States,* 52 L. R. A. (N. S.), I.

"There was testimony before the Commission to the effect that almost the only freight that could be carried by the railroad company consisted of the logs cut from the timber in a restricted section in Columbia county, amounting to about 2,000,000,000 feet, and that when this was exhausted the plant of the company would have only a scrap value. In other words, aside from the junk value of the plant, it would perish in the using. The doctrine that the shipper should be required to pay such a rate as would not only yield a reasonable return on the value of the property, but also provide for absorbing its depreciation, is abundantly established in cases involving roads which are permanent in their character and which may reasonably be expected to have a flourishing traffic perpetually, or at least as long as

carriage by railroad shall continue in vogue. The precept is equally applicable to a road the activity of which is circumscribed by the fact that freight available for it will be exhausted in the near future. The principle is the same, and the two cases differ only in the degree and rapidity of depreciation. A fully equipped railroad, built on a circle within a radius of a hundred miles from the North Pole, would be, at the present day, utterly valueless. There would be no traffic for it and nothing to use it for. Differing only in degree would be a railroad running into a logged-off barren, where there was nothing for it to haul and no use to which it could be put. There was testimony from which the Commission could arrive at the conclusion that this would be the fate of the railroad here involved, in the near future. It was within the scope of the Commission's authority to establish such a rate as would amortize this depreciation, as well as to yield to the carrier a fair return for its services. To hold otherwise would be to say that, when an individual or corporation devotes property to public uses, it amounts to a voluntary sacrifice or thank offering on the public altar. Under our Constitution no such gratuity is contemplated. In proper cases, under the law of eminent domain, the public may condemn and take the property of a private concern, of course accompanied by an award of just compensation. The individual may voluntarily devote his property to the public service, without awaiting condemnation, granting to the public the option of taking it and using it, but only on the condition that such remuneration shall be afforded as will enable the individual to come out even."

Here, the user consumes the property, and consuming must therefore be charged. The exhaustion of the timber

is not subject to the control of the carrier. Its owners control that. Therefore, the period of the Gulf Company's usefulness is conditioned by the utilization of the timber owners. No person can be deprived of property without due process of law, nor can the railroad be compelled to operate when its operation, at the prices allowed, consumes its invested capital. *Brooks-Scanlan Co. v. Com.*, 251 U. S., 383; *R. R. Co. v. Mills*, 253 U. S., 208; *Bullock v. R. R. Com.*, 254 U. S., 520; *Vandalia R. R. v. Schnull*, 255 U. S., 120; *Bluefield v. Com.*, U. S. Sup. Ct. Adv. Op., 1923, p. 718.

Return of capital in a self-limited operation is an inherent right of property; without the recognition of such a right by a State, or by the United States, there would be a deprivation of property without due process of law. *Kansas City Sou. R. R. Co. v. U. S.*, 231 U. S., 423, where there was quoted with approval *Knoxville v. Knoxville Water Works Co.*, 212 U. S., 14.

As said in *Electric Co. v. Chariton*, 255 U. S., 541:

> "Two propositions are indisputable: (*a*) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations (*Reagan v. Farmers Loan & T. Co.*, 154 U. S., 362; 38 L. Ed., 1014; 4 Inters. Com. Rep., 560; 14 Sup. Ct. Rep., 1047; *Smyth v. Ames*, 169 U. S., 466; 42 L. Ed., 819; 18 Sup. Ct. Rep., 418; *San Diego Land & Town Co. v. Jasper*, 189 U. S., 439, 442; 47 L. Ed., 892, 894; 23 Sup. Ct. Rep., 571; *Knoxville v. Knoxville Water Co.*, 212 U. S., I, 17; 53 L. Ed., 371, 381; 29 Sup. Ct. Rep., 148; *Willcox v.*

Consolidated Gas Co., 212 U. S., 19, 41; 53 L. Ed., 382, 395; 48 L. R. A. (N. S.), 1134; 29 Sup. Ct. Rep., 192; 15 Ann. Cas., 1034; *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S., 352, 434; 57 L. Ed., 1511, 1555; 48 L. R. A. (N. S.), 1151; 33 Sup. Ct. Rep., 729; Ann. Cas., 1916 A, 18; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S., 655; 56 L. Ed., 594; 32 Sup. Ct. Rep., 389; *Des Moines Gas Co. v. Des Moines*, 238 U. S., 153; 59 L. Ed., 1244; P. U. R., 1915 D, 577; 35 Sup. Ct. Rep., 811; *Denver v. Denver Union Water Co.*, 246 U. S., 178, 194; 62 L. Ed., 649, 662; P. U. R., 1918 C, 38 Sup. Ct. Rep., 2178)."

Again in *Missouri ex Rel. v. Public Service Com.*, 1923, U. S. Sup. Ct. Adv. Op., 623, it is declared:

> "It must never be forgotten that while the State may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel. Springfield v. Springfield Gas & E. Co.*, 291 Ill., 209, 234; P. U. R., 1920 C, 640; 125 N. E., 891:
>
> "'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.'"
>
> *Southern Pacific Co. v. Commission*, 219 U. S., 443.

See also *Ga. Ry., etc., v. R. R. Com.*, U. S. Sup. Ct. Adv. Op., 1923, 730; *Galveston Electric Co. v. Galveston*, 258 U. S., 388, wherein, at page 399, the phrase "depreciation annuity" is utilized, directly expressing this very conception,

Note the principle applicable in *I. C. R. R. Co. v. Commission*, 206 U. S., 441, where, at page 462, this Court said:

> "It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their duration, and that improvements that will last many years should not be charged wholly against the revenue of a single year. * * * The elements of that value may be many and complex, not always determinable, as we have seen, with mathematical accuracy, but, we think it is clear that instrumentalities which are to be used for years should not be paid for by the revenues of a day or year; and this is the principle of returns upon capital which exists in durable shape."

In 52 L. R. A. (N. S.), 15, will be found a note covering depreciation, instancing how it has been dealt with, both by this Commission and by State commissions, and especially instancing how it should be accounted where there is an expiring franchise, page 38, where that author said:

> "In addition to these causes, however, there may also be loss due to the expiration of the franchise. If it is one for a limited term, say twenty-five years, and, by reason of proper charges to depreciation the investment is kept intact, the company will nevertheless suffer loss if the right to use the streets is not

> renewed. The plant will be worth merely its scrap or second-hand value, less the cost of breaking it up, and restoring the highway to its original condition. Under a perpetual franchise it would be impossible to estimate the life of the property only approximately; but if the franchise is for a limited period, and granted with the understanding that it is not to be renewed, and there is a provision that the property of the company in the streets is to revert to the municipality without cost at the end of the term, the length of life of the plant is certain, and sufficient rates must be charged to permit the company to receive back the principal of its investment at the expiration of the franchise."

League v. R. Co., Ann. Cas., 1914 A, 1161, says:

> "Every car of ore hauled over them lessens their span of life, for their supply of traffic depends upon the mines, which sooner or later become exhausted, when the industries carried on about them and the roads themselves must pass away."

In *Landon v. Commission*, 234 Fed., 161, there was a large lot of pipe laid at large expense requisite to market the output of a self-limited natural gas field and there the right to capital return was expressly recognized.

Nothing will be more analogous than the exhaustion of timber, and just as it was with gas, so will it be here, and each carload of timber taken from the total must be taxed to keep from depriving the owner—the carrier—of property without due process of law.

Again, in *Fort Smith Co. v. Ft. Smith*, 202 Fed., 590, the Court said:

"It is alleged in the bill, and testimony was produced by the plaintiff to show, that the field from which plaintiff obtained its supply of gas is becoming exhausted. On cross-examination by counsel for the city one of the witnesses was asked whether the determination of the question of the quantity of gas in the field was not speculative. The witness answered in the affirmative. Upon that answer counsel for the city urged that the company was not warranted in increasing its price because of the uncertainty of the fact of the exhaustion of the field. There does not seem to be any force in that argument. The logical conclusion from the uncertainty with regard to the question of supply is directly opposed to the argument made. In the case of the *Kennebec Water District v. Waterville,* above cited, the Court said:

"'There is another matter which we think may fairly be conceded in connection with the reasonableness of rates. We think something may be allowed in this respect for the risks of the original supply, if there were any. It is common sense that those who invest their money in hazardous supplies may reasonably be entitled, for a time at least, to larger returns than would be the case if the success of the undertaking were assured from the beginning.'

"Uncertainty in any venture is always an element to be considered in fixing a price upon the product or result of that venture.

"The allegations of the bill and the testimony warrant the issuance of a temporary restraining order on the ground of the failure of the council to make the investigation required by the laws of the State. *Silver v. Louisville & Nashville R. Co.,* 213 U. S., 175; 29 Sup. Ct. Rep., 451; 53 L. Ed., 753."

The record in this cause shows beyond controversy the critical condition in which this carrier will be plunged, and we can but rely upon what was said in *Block v. Hirsh,* 256 U. S., 165; 65 L. Ed., 875:

> "There can be no conception of property aside from its control and use, and upon its use depends its value. *Branson v. Bush,* 251 U. S., 182, 187; 64 L. Ed., 215, 219; 40 Sup. Ct. Rep., 113. Protection to it has been regarded as a vital principle of Republican institutions. It is next in degree to the protection of personal liberty and freedom from undue interference or molestation. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S., 226; 41 L. Ed., 979; 17 Sup. Ct. Rep., 581. Our social system rests largely upon its sanctity, 'and that state or community which seeks to invade it will soon discover the error in the disaster which follows.' *Knoxville v. Knoxville Water Co.,* 212 U. S., I, 18; 53 L. Ed., 371, 382; 29 Sup. Ct. Rep., 148."

When Swift thus invades the property right and takes from the bondholders of this corporation that which constitutes the only value allocatable to their property without compensating them therefor, there has been a physical invasion. If, under the ruling of the Commission, an actual test is requisite, we point to the Brooks-Scanlan Railroad, our neighbor on the south, and to the Liberty-White Railroad, our neighbor on the north, both of which, when they had moved their tributary timber tonnage, went to the junk heap with a loss to all concerned, because they had failed to account properly. The necessity for a reserve to restore capital has been impliedly, if not expressly recognized in every case from *Smythe v. Ames,* 169 U. S., 466, down to *Georgia Ry. Co. v. Railroad Commission,* U. S. Supreme Court Adv. Op., 1923, 728.

The laws of accounting but reflect the underlying principles upon which business must be done, and in this cause, there is presented sharply the question as to whether the Commission has power to disregard, as speculative, this principle. When the Commission fails to reckon correctly a principle of law, it thereby therefore becomes subject to review. It has failed to accord to that which is inevitable, namely, time limitation of a self-limited service, and has so far disregarded the law as to make its order void.

In *N G Fung Ho v. White,* 259 U. S., 284, the Court declared:

> "Courts have no power to interfere unless there was either denial of a fair hearing (*Chin Yow v. U. S.,* 208 U. S., 8; 52 L. Ed., 369; 28 Sup. Ct. Rep., 201), or the finding was not supported by evidence (*Am. School v. McAnnulty,* 187 U. S., 94; 47 L. Ed., 90; 23 Sup. Ct. Rep., 330, or there was an application of an erroneous rule of law (*Gegiow v. Uhl,* 239 U. S., 3; 60 L. Ed., 114; 36 Sup. Ct. Rep., 2)."

See, also, *Kwock Jan Fat v. White,* 253 U. S., 454, 465; 64 L. Ed., 1010, 1015; 40 Sup. Ct. Rep., 566.

In this cause, we must sustain this legal principle only to the extent that it is an applicable principle of law which was disregarded by the Commission in its judgment, and of this, there can be no doubt.

But, said counsel, "the order does not require the reduction of any rate," and therein counsel errs. No one question has been subject to greater litigation before the Commission than the matter of lumber rates from this territory. *I. C. R. R. Co. v. Interstate Commerce Commission,* 206 U. S., 441; *Southern R. Co. v. Tift,* 206 U. S., 428, where an attempt to

raise rates on lumber 2 cents was condemned as unreasonable, *per se,* by the through carriers, whereas, as to Fernwood, Columbia and Gulf, the rate has been held reasonable. That the trunk lines cannot raise their rates is demonstrated by the cases of *Central Yellow Pine Association v. Ill. Cen. R. R. Co.,* 10 I. C. C., 505; *Rates on Lumber from Southern Points, Investigation & Suspension Docket,* 520; 34 I. C. C., 652; Sup. Rep. 36 I. C. C., 137; *Board of Trade v. I. C. R. R.,* 37 I. C. C., 709; *Board of Trade v. Abilene,* 37 I. C. C., 760; *Lumber Rates Fourth Section Application,* 25 I. C. C., 50; *Commercial Club v. I. C. R R.,* 30 I. C. C., 40.

Opposite counsel seek to confess and avoid for divers specious reasons.

(*a*) Resort should be had, say counsel, to the Commission for an increase in divisions, but the Commission has prejudged our case, and refused our cause by declaring this demand is predicated upon "mere speculation" (Tr., 150), and, hence, not ground for relief.

Compelling a litigant to appear before an administrative body which has prejudged his case at a prior time, decided it against him, does not comport with the Constitution. *Abrams v. Jones,* 207 Pac., 727.

As declared in *In re Cameron,* 151 S. W., 76:

> "Beyond question, it is not according to due course of law to compel a man over his protest to try his case before a judge who has already decided it, and has announced that decision in advance of the hearing. It is equally true that such compulsion is a denial of justice."

(*b*) This petition before the Commission was filed July 2d, 1919, when the carriers were under Government control, and defendants were being operated by the United States as a war-time necessity. The Railroad Administration (Tr., 98), acting for the Government, determined that this arbitrary should be the sole method of creating additional revenue for the short lines and, with the utmost deference, as at that date, the Commission was incompetent to make an order under which the policy of the Government through the Railroad Administration would have been embarrassed, as under this record, no attention whatever being given to the express provisions of the Federal Control Act. Therefore, when the Railroad Administration thus dealt with the short lines, as a matter of national preservation, the Commission had no authority to subvert that which was deemed requisite for the public welfare and as to this matter the Government was not coercible.

The trunk line carriers in this cause appear merely as "formal parties" (Tr., 21). "That said 'controlled line' railroad companies as so operated, which complainant asks be considered *as formal parties defendant* hereto."

During Government operation, the carriers as such were not responsible for the rates then obtaining. *Dahn v. United States,* 258 U. S., 428; *Missouri Railroad Company v. Ault,* 256 U. S., 554; *Northern Pacific R. R. v. North Dakota,* 250 U. S., 135.

In addition, under the Federal Control Act of March 21, 1918, Section 10, Fed. Stat. An., p. 763, expressly declares:

> "That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifi-

cations and practices, by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices, shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition."

"After full hearing the Commission may make such findings and orders as are authorized by the Act to Regulate Commerce, as amended, and said findings and orders shall be enforced as provided in said act, provided, however, that when the President shall find and certify to the Interstate Commerce Commission that any order to defray the expenses of Federal control, an operation fairly chargeable to railway operating expenses * * * it is necessary to increase the railway operating revenues, the Interstate Commerce Commission, in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said

finding and certificate by the President together with such recommendations as he may make," and this is precisely the answer herein filed (Tr., 28).

There was no objection made to the rates established by the Director General and no action had by the Commission thereon, unless this proceeding could, erroneously, be treated as falling under Section 10.

The evidence has relation to the interrelation between the Railroad Administration and the petitioner as of July 2, 1919, and it is not a proceeding under Section 15 in any aspect. There is not in this record one line of evidence dealing with any subsequent development, whereunder the controlled lines were later returned to their owners, and it is thoroughly well settled: "An order of the Commission fixing rates, if unsupported by evidence, is clearly invalid. *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S., 541, 547; *Fla. East Coast R. R. v. United States*, 234 U. S., 167." *Akron, C. & Y. R. Co. v. U. S.*, U. S. Sup. Court Adv. Op., 1923, page 316. Therefore, in this cause, the evidence relates not to the rate structure of independent corporate carriers, but attacks solely the rate structure existing during Federal Control, and this evidence is directed thereto, and the Commission, in failing to proceed in accordance with Section 10 of the Federal Control Act, clearly violated its statutory obligation.

(*c*) But, assuming the foregoing to be in error, yet, nevertheless, the condition of the carriers did not warrant this relief. The only two connections of the Gulf Company were the N. O. G. N. Railroad, and its witness testified as to conditions then obtaining thus:

"The New Orleans Great Northern Railroad in the first nine months of 1918 earned 107.7 per cent of its compensation. By compensation, I mean what the United States Railroad Administration, or the United States Government, allowed us for the use of our railroad during the war time.

"For the same period of 1919, we have only earned 12.5 per cent, showing a deficit of 87.5 per cent for that railroad.

"That should clearly show that the New Orleans Great Northern Railroad is not in any position to allow the Fernwood & Gulf * * *, any greater allowances out of the junction point rate, if the Commission should decide that was a proper basis of rates from those stations; and if they did require a greater proportion, or rather demand that, or if the commission even went into the feature of divisions and stated that the trunk lines would have to allow them, we would have to withdraw from the business."

This evidence is uncontradicted. On the contrary, after a few formal questions, this witness was dismissed, and, of course, it was admitted by the motion to dismiss.

Turning to the record, as to the Central Company (Tr., 110), we find:

"Q. I will ask you whether or not your railroad is in position to make any additional allowances and absorb these arbitraries?

"A. No, sir, * * * and we certainly are not prepared to allow them anything in addition to that.

"Q. Your earnings are not such as to justify any additional allowances?

"A. That is correct.

"Q. If you were called on to make additional allow-

ances, state what would be the effect as to an advance or not in rates.

"A. What do you mean by an advance or not—in rates?

"Q. Whether you would not have to advance the whole lumber rates if you had to make additional allowances to the short lines?

"A. That would be absolutely necessary, because we could not afford to allow them any additional earnings out of the present rates" (Tr., 110, 111).

The amount of this general reduction in rates, as at that time, would have been tremendous (Tr., 111). Again (Tr., 116):

> "The second point I wanted to convey was that our returns today are such that we could not even consider increasing our shrinkages to any of these roads."

This was on cross-examination by Mr. Palmer, counsel for petitioner, and with this answer he rested content, and did not see fit to go into details. There was no evidence before the Commission authorizing the assumption that the Commission could allow additional compensation because as to one carrier, its returns were only 12.5 per cent of normal, as shown by the returns to the Commission, and as to the other carrier, in the same territory, while the specific proportion is not given, it would not be amiss to assume that the loss in revenue was equally disastrous. Therefore a resort to the Commission to divide that which substantially had no existence would force both carriers to withdraw from this business and to leave Knoxo without through rates. The petitioner must first show there was something to divide before a division may be called for.

(*d*). This averment of want of adequate revenue is made by the bill, and, must be on this hearing, accepted as true.

But, for the moment, let us assume that the Gulf Company does not become a part of a through transportation system, as the Commission says it may. There will have been no expenditure of the reserve so created for capital retirement and the Commission, in allowing this reserve to be created may prescribe such terms therefor as to adequately safeguard the rights of the public. Whether it will be destroyed, or not, will be known in a few years. They may earmark each dollar so thus received, and should this company become part of a through line, then of necessity, forthwith, it would not be entitled to such a reserve, and immediately the recapture clause of the Transportation Act would become applicable.

As pointed out in *Akron, etc., v. United States,* U. S. Sup. Court Adv. Op., 1923, 311:

> "The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this, two new devices were adopted; the group system of rate making and the division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system

> to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable."

With this express provision for recapture of surplus, if that which the Commission said might happen, did happen, then these earnings would forthwith be recaptured from the reserve for the public benefit. In this case, the Commission required the Gulf Company to continue upon the hypothesis that it may, contrary to the uncontradicted evidence, continue as a carrier until it should die; and then, at its death, it would be solemnly declared that it should have been allowed to make the capital return as above pointed out. It would be too late. *Post mortem* examinations may benefit science but never the corpse. Our contention is, that the 5th Amendment gives us the right to set up this reserve, under the admissions, shown to be true by the evidence in this cause, especially, when, if it is set up, the condition of its utilization can be prescribed by the Commission. If the condition, which the Commission says is possible, should occur, then, the recapture clause would turn this fund over to the United States. The Gulf Company would be compelled to forego that to which the evidence shows it is entitled, upon the hypothesis that the unexpected may happen. Property rests, under the Constitution, upon no such precarious predicate and where, as here, all parties may be adequately protected, protection must be given. This recapture clause, however, is not absolutely essential to justice, because the Commission could prescribe the terms otherwise, and make such terms as would, effectually, prevent utiliza-

tion for purposes other than that set up in the creation of this fund.

When the Gulf Company is admonished of the necessity of such an accounting by the death, bankruptcy, of its neighbors, it would be the most refined cruelty to compel it, consciously, to continue to sacrifice its property upon the altar of the public without requiring compensation to be made. So long as this consciousness was not present, so long as this inevitable destruction was not appreciated, the reserve was not set up by reason of ignorance, and as to that we cannot grind with the water that has passed, but with that which is yet to come, we may grind, and grind, effectually, in accordance with the Constitution.

Swift—his mill—Knoxo—have all disappeared; but the wrong that will be wrought to the Gulf Company, unless it be allowed to set up a reserve to preserve its property under the Constitution, will paralyze the protecting power of that instrument upon which its life and its property rests.

Point IV.

Gulf Company Constitutionally Entitled to Fix Rates.

Swift owned timber not located upon a main line carrier; in order to move that tonnage to market, Swift must overcome the disadvantage of place, inherent in his timber, and he frankly admitted (Tr., 58):

> "Q. You would not tell the Commission, would you, that these disadvantages which you have enumerated did not find expression and were not indi-

cated (integrated) in the price that you paid for this timber?

"A. I have just stated that these disadvantages and the fact that the timber was away from the railroad did influence the price. We bought it as cheaply as we could and these things influenced the owner of the timber to accept a lower price than they would if that timber had been standing close to a railroad where it could have been logged at less expense." (Tr., 59.)

Hence, in acquisition, Swift obtained this advantage in price from appellee's privies in estate, and thereby, in equity, should be required to transport the timber to the railroad at his own expense, so as to be on a parity with his competitors. A difference of two cents did not preclude him from sales of his tonnage. At one time more severe differentials existed, wherein consider:

"Now, with reference to the impossibility of competing with a two-cent differential, please state to the Commission whether or not it is not a fact that in a former case, there was a difference in the rate on lumber hauled in a flat car over the rate on lumber hauled in a box car of sometimes as high as 7 cents, and it was subsequently reduced to 3?

"A. My recollection of that, Mr. Green, is just the opposite; that is, the flat car rate was lower than the box car rate.

"Q. All right.

"A. That is my recollection." (Tr., 103.)

The condition of the carrier, the Gulf Company, was such that (Tr., 148):

"The Fernwood & Gulf shows that it has operated at a loss and that the loss would be greater if its reve-

nues on lumber were reduced by the amount of the arbitrary, since lumber supplies 93 per cent of its total traffic."

Such is the finding of the Commission. It appears that prior to 1906, the Gulf Company charged those owners of timber adjacent to its line 5 cents per hundred pounds for transporting the lumber from that timber to the through line of railroad—thus overcoming the place disadvantage incident to the property ownership of timber so located. This duty of so overcoming this disadvantage appertained to the owner, and if he required another for him to so overcome, and that other was a common carrier, therefor he must pay that common carrier a reasonable rate.

Initially this obligation of transportation to the through line carrier existed upon the owner, and he could not get his timber converted into cash until he, at his own expense, hauled his lumber from the point where he had bought it to the point where the more high priced timber was—upon the trunk line. To thus overcome was his own burden, to be borne at his own expense, and, with deference, to be borne without crying because he had chosen to make the purchase on a more economical basis for this precise reason. Thus, owning timber, so circumstanced, wherefore he must pay for transportation to the through line, it is not unjust or discriminatory to compensate the temporary carrier, short-lived, with a single tonnage to move, for doing that which, without that carrier, the owner must have done for himself.

This rate structure was not new; Swift knew all about it when he purchased, and having purchased, as said in *Watts v. Buchanan,* 92 Miss., 544:

> "However, we need not bother about this, but prefer to plant ourselves in this particular case before us * * * on the language of the New York Court that, 'that kind of plunder which holds on to property, but pleads the doctrine of *ultra vires* against obligation to pay for it, has no recognition or support in the laws of this State."

Swift came into possession of this timber through a purchase from those in privity with the former owner of this company, and he holds the profits realized from the manufacture thereof reflected in its then location, and has never sought to return the consideration. The condition of this line is accurately pointed out by Mr. Fush, its general auditor. It had not set up any depreciation upon its road bed; its ties were worn out.

> "Q. In other words, three out of every four of your ties, in the normal course, would need replacing now?
> "A. Correct." (Tr., 126.)

The bridges had depreciated and wrecks were frequent, and the company had bills payable of $20,000.00 for purposes of current expenses (Tr., 127, 128), which were absorbed in large measure by a serious wreck occurring just at that time. There can be no dispute as to the need of revenue, and no dispute that this rate structure had been in existence under a fixation made by this company since 1906, and no dispute that Swift located upon this line and covenanted to ship his tonnage at this rate.

It is contended, first, that under Section 3, the order of the Commerce Commission precludes this court from finding to the contrary, citing, *Seaboard Air Line Ry. Co. v. U. S.*,

254 U. S., 57; *U. S. v. L. & N. R. R. Co.*, 235 U. S., 320: *St. Louis S. W. R. R. Co. v. U. S.*, 245 U. S., 136. But where, as here, the facts are undisputed, the question is one of law for the Court. *Central Railroad of New Jersey v. U. S.*, 257 U. S., 247; *Philadelphia, etc., v. U. S.*, 240 U. S., 334; *East Tennesse, etc., v. Commission,* 181 U. S., 18; *Texas, etc., v. Com.,* 162 U. S., 197; and even under the cases, *supra,* relied upon by appellant, the order must be reasonable and not arbitrary as is the case here.

Again, it is contended that by participation in traffic from Fernwood, Foxworth and Tylertown, under the group rates named by competitors, Gulf Company is precluded from questioning the order of the Commission, even though the order expressly finds that the rate, including the arbitrary, is reasonable for the service rendered, and the finding of reasonableness includes the allocation of the 2 cents additional to the Gulf Company as its own. This fact must not be overlooked because the interrelation between the Gulf Company and the arbitrary was expressly pointed out and adjudicated. As to Fernwood, Foxworth and Tylertown, the Commission granted Fourth Section relief, holding that these rates were thus lawful, and solely in virtue of the permission of the Commission were these rates lower than its reasonable rate charged and collected. In short, it was not until the Commission itself had approved this that they were so named.

The Gulf Company did not name these rates voluntarily, but only to participate in the business originating which otherwise would have moved via the trunk line. Had it sought to collect its arbitrary, no one would have patronized it for obvious reasons, but if it is called upon to elect, it elects to forego the business at Fernwood, Tylertown, and Foxworth, and to name the rate to include its arbitrary.

Section 3 makes its violation a crime, but meeting competition with the Commission's permission is not criminal. The case against the Gulf Company consists in showing that the Central Company publishes one rate, whereas the Gulf Company, in common with the many other short lines connecting, eight in number, publish higher rates from their local stations. The Commission, contrary to the decisions of this Court, makes the criterion for the Gulf Company's rates those upon the Mississippi Central, which were extended back on that line through the Southern Railway, as frankly pointed out by opposite counsel, at page 5 of his brief; this removes discrimination. But, beginning in 1906 and continuing to the present, Gulf Company has named its own rate, plussing the junction point with its own arbitrary, in virtue of individual right. Long acquiescence so sanctions a practice and makes it unassailable. Laches preclude relief in favor of Swift.

The fundamental proposition, which the Commission overlooks, is that the obligation to get this timber to the main line rested on Swift; when he hired another to relieve him of this obligation he must pay that other a reasonable compensation, commensurate with that which he would have individually incurred had he personally performed. Section 3 does not make every preference or advantage unlawful, but it is only those which are "undue and unreasonable." That act says:

> "It shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever."

If, as held, the rate, including the 2-cent arbitrary from Knoxo, is a reasonable rate, the shipper has no ground for complaint. It could not be undue and unreasonable preference.

This arbitrary belongs to the Gulf Company, and no other company at any time, or at any other place has ever directly, or indirectly, participated therein to any extent whatsoever. This arbitrary is its own property, and has been its own property constantly since Swift agreed to pay it. Receiving did not cause discrimination. *Mercantile Lumber Company v. I. C. R. R. Co.,* 53 I. C. C., 688, was a much stronger case than the case at bar. That for which the arbitrary is exacted is the transportation by a short lived carrier to the main trunk line. The Illinois Central does not name this rate, and does not participate in the arbitrary which the Gulf Company receives.

Section 3 came under construction in *East Tennessee, etc., R. R. Co. v. Com.,* 181 U. S., 18, where it was said:

> "The prohibition of the third section when that section is considered in its proper relation is directed against unjust discrimination or undue preference arising from the voluntary and wrongful act of the carriers complained of as having given undue preference, and does not relate to acts the result of conditions wholly beyond the control of such carriers. And special attention was directed to this view in the Behlmer case, in the passage which we have previously excerpted. To otherwise construe the statute would involve a departure from its plain language, and would be to confound cause with effect. For, if the preference occasioned in favor of a particular place by competition there gives rise to the right to charge the lesser rate to that point, it can-

not be that the availing of this right is the cause of the preference; and especially is this made clear in the case supposed, since it is manifest that forbidding the carrier to meet the competition would not remove the discrimination."

Again, in *Philadelphia & Reading Co. v. United States,* 240 U. S., 334, the Allentown Portland Cement Co. alleged that this railroad operated the only line reaching its Evansville plant, and, in connection with the other defendants, transported cement therefrom to many other points, including Jersey City, and that the rate, $1.35 per ton, charged to the latter place was unlawful under sections I and 3. The reasonableness of the rate in section I was found; but the Commission said:

"That carrier transports the cement in question from Evansville to Allentown, where it delivers it to one of numerous connections which either transports it to Jersey City or in turn delivers it to other carriers for final delivery at Jersey City. The rate via these various routes is $1.35. Certain of the carriers which receive this Evansville cement from Philadelphia & Reading at Allentown also serve other mills in the same general vicinity as Allentown, namely, the Lehigh district, either directly or through connections. The rate from these other mills to Jersey City is 80 cents. The Philadelphia & Reading does not participate in the 80-cent rate from any mill in the district. (31 *Inters. Com. Rep.,* 277.)

"Evansville is situated in the Lehigh district and is one of the numerous cement-producing points in that district located within a radius of perhaps 20 miles of each other. None of these mills, however, are reached by the Philadelphia & Reading, they be-

ing served by the Central Railroad of New Jersey or Lehigh Valley direct, or by short lines of railway which connect with these carriers at distances of from one to 16 miles from their junction points. While the rate to Jersey City is thus $1.35 from Evansville on the Philadelphia & Reading, the rate to Jersey City from these competing mills on other lines is 80 cents. * * * On shipments to Jersey City for transshipment by water to points in the Southeast, such as Charleston and Savannah, the rate is 80 cents from Evansville, the same as it is from these other mills, and this equality of Evansville with the other mills is maintained on traffic to Philadelphia, Baltimore, New York and New England. In other words, the rate is the same from Evansville as from other mills in the Lehigh district to all points east, except on traffic to Jersey City for local consumption.

"The 80-cent rate to Jersey City locally from the other mills is used in connection with shipments destined to New York, that rate plus the trucking charge to all points south of Ninetieth Street totaling less than the $1.40 rate to New York proper plus the trucking charge to same point, the result being that complainant, who must use the latter rate, is effectively barred from competition in that part of the city located south of Forty-third Street, which is the greatest cement-consuming district. North of Ninetieth Street complainant can compete with the other mills because of their greater expense in the longer truck haul from Jersey City. It will also necessarily be apparent that complainant cannot sell any cement in Jersey City for local consumption in competition with these other mills which have the 80-cent rate.

"It cannot be questioned that complainant is laboring under a prohibitory disadvantage in marketing its product in Jersey City under the present rate in

competition with other mills in the same district. While it is true that the Philadelphia & Reading does not have any hand in the establishment of the 80-cent rate from these other mills, as it cannot participate in that traffic because it does not serve them, it is also true that it is a party to tariffs under which cement may be purchased as cheaply at Evansville as at neighboring mills in the Lehigh district by dealers and consumers of cement at practically all points of importance east of that district, with the single exception of Jersey City. Why Jersey City should be singled out by that carrier as the one exception to this equalization of rates as between competing mills in the same district has not been satisfactorily shown by this record. We are therefore of the opinion, and find, that in maintaining or participating in rates on cement in carloads to other eastern destinations, such as Baltimore, Philadelphia, New York and New England points, which are not higher from Evansville than the contemporaneous rates which it maintains or participates in from other mills in the Lehigh district, while refusing contemporaneously to participate in the same relative adjustment from Evansville to Jersey City, the Philadelphia & Reading, as well as the other carriers defendant, are subjecting Jersey City and its traffic to an undue prejudice and disadvantage, from which an order will be entered to cease and desist (27 *Inters. Com. Com. Rep.*, 448)."

This quotation is from the opinion of the Commission. In concluding its opinion, *avoiding the order,* the Court said:

"If a universal rate of $1.35 could not be complained of by the locality, certainly it is not discriminated against or unlawfully prejudiced because,

> failing to agree, most of the carriers have established an 80-cent schedule. In the circumstances disclosed it is impossible rightly to conclude that Jersey City is being subjected to 'any undue or unreasonable prejudice or disadvantage.' "

The leading case recently decided upon this subject is *Central Railroad of New Jersey v. United States,* 257 U. S., 247, where precisely a similar condition obtained, and this Court held that participation in joint rates did not make carriers partners:

> "They can be held jointly and severally responsible for unjust discrimination only if each carrier has participated in some way in that which causes the unjust discrimination; as where a lower joint rate is given to one locality than to another similarly situated. *Penn Ref. Co. v. Western New York & P. R. Co.,* 208 U. S., 208, 221, 222, 225; 52 L. Ed., 456, 462, 463; 28 Sup. Ct. Rep., 268. Compare *East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission,* 181 U. S., I, 18; 45 L. Ed., 719, 725; 21 Sup. Ct. Rep., 516. If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all joint rates, could afford to carriers the assurance that they were not in some way violating the provisions of Section 3. What Congress sought to prevent by that section, as originally enacted, was not differences between localities in transportation rates, facilities and privileges, but unjust discrimination between them by the same carrier or carriers. Neither the Transportation Act, 1920, February 28, 1920, chap.

> 91, 41 Stat. at L., 456, nor any earlier amendatory legislation, has changed, in this respect, the purpose or scope of Section 3."

There is nothing in the *Paducah Case,* 245 U. S., 136, that in any way is inconsistent with these three decisions of this Court. Primarily, that case involved Section 1, the rate to Paducah being unreasonable in and of itself.

Again the rate, as an entirety, was there attacked, in the making of which all carriers participated. In this case, the only carrier interested in the arbitrary is the Gulf Company, and no other carrier in anywise participates therein. Furthermore, that for which the excess charge is made is for transportation *to* the trunk line, not transportation *by* the trunk line after the tonnage reaches its rails. The charge for that which Swift would have to do for himself is not unreasonable, and the fundamental difference between the rate structure in the Paducah Case and the rate structure in this case is the difference between a joint trunk-line structure, and one in which the shipper employs a short line to overcome that which he must otherwise do himself, at his own expense.

The *Richmond Switching Case,* 254 U. S., 57, 62, does not contravene, because there the discrimination was the individual act of the delivering carrier performed precisely under similar circumstances and conditions. Outside of these two cases, no citations, with deference, are made which militate, even seemingly, against our contention.

In this cause, appellant would take from this carrier its power to manage its own affairs, to group its rates as it sees fit, and to shape its policy as it deems best; and the Commis-

sion seeks to compel this carrier to abdicate, and to allow its competitors to so arrange its affairs as that the rate structure in force since 1906, assented to by Swift, must be upturned by reason of what is done by others. If the principle here announced is carried out, then each short-line carrier would be controlled absolutely as to its rate structure by those things done by its competitors actuated in not a few instances, by a desire to absorb, and thereby, at the same time, destroy. As declared in the Creosoting Case:

> "If this were not so, the legality or illegality of a carrier's practice would depend, not on its own act, but on the acts of its connecting carriers. If that rule should prevail, only uniformity in local privileges and practices, or the cancellation of all joint rates, could afford the carriers the assurance that they were not in some way violating the provisions of Section 3."

This carrier would rather cancel all joint rates and revert to its original condition than to allow its property to become subject to other than its own management in accordance with the law.

The theory is that of a revocable grant of a use only. *Weems Steamboat Co. v. People's Steamboat Co.*, 214 U. S., 345.

That which the Gulf Company granted the public was the right to use its line as a common carrier. This grant involved, as concomitant, the absolute right to exact of those using a reasonable return for its use, and the Commission has, in this cause, found that the return exacted of Swift was and is a reasonable return for the service rendered. So finding, the sole further power, under the Constitution, of the

Commission is to compel the carrier to transport for all upon the same terms. The right so to do, namely, to exact a reasonable compensation, found to be reasonable by the Commission in this very case, precludes the power of the Commission to compel service at a lower rate, because another carrier has so done under other conditions, under other circumstances.

We deny the right of the Commission to integrate into the Gulf Company's rate structure prices fixed by our competitors. Under the grant made, as phrased in the Wolf Case, irrevocable as therein declared under the Munn Case, the right was conferred upon the public to a use of the property for a reasonable return, but this right was not granted to our competitor. He was and always remained our enemy, and it was, under the law of competition, he desired that we be destroyed, so that he might make his business the more profitable; but when, as here, the grant is to the users and owners of this timber, it does not vest in a carrier, situated at a distance, the right to control that which appertained solely to our customers and ourselves. As phrased in the Wolf Case, we can give up the franchise if the operation is impossible without continuous loss, and under the financial exhibits made, there would be foreordained not only a continuous loss, but an absolute destruction of our property.

If all of this timber had belonged to one individual, and by reason of the necessities appertaining to a war (or other matters whereunder this individual had become subject as to the price or disposition to the public authority), and the removal had been requisite over this railroad, as it is now, and the Constitution still stood as admeasuring price, it would have been requisite, to have vouchsafed to this individual the

cost of the railroad in admeasuring the disposition price of the timber. The mere fact that the legal interrelations are now vested in divers corporations does not in any wise authorize the Commission to deprive corporations of the equal protection of the law; they are just as much entitled thereto as is the individual. *Railroad Company v. Ellis,* 165 U. S., 154; *Finance Corporation v. Exchange Corporation,* U. S. Supreme Court Adv. Op., 1923, page 757.

As was said in *Georgia Railway & Power Company v. Railroad Commission,* U. S. Supreme Court Adv. Op., 1923, page 729:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, that which the public is entitled to demand is that no more be exacted from it for the use of a public highway than the service rendered by it be reasonably worth."

Under this rule, the Commission has found that a fair return is made under this reasonable rate, and nowhere, in this or any previous case, do we find what the Commission has here used as an instrumentality for breaking down our reasonable return has been allowed. As said in *Bluefield, etc., v. Public Service Commission,* U. S. Supreme Court Adv. Op., 1923, page 718:

> "It seems to be generally held that in the absence of peculiar and extraordinary conditions * * * the actual amount of money invested is to be taken as the basis and upon this a return must be allowed equivalent to that which is ordinarily received in the locality in which the business is done upon capi-

> tal invested in similar enterprises. In addition to this, consideration must be given to the nature of the investment, a higher rate being regarded as justified by the risk incident to a hazardous investment."

Now, if the hazard of the investment increases, the reasonable return, under the Constitution, of necessity, consumption of the property in the use renders requisite a rate that will make a capital return. As further declared in that case:

> "Rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render the service, are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the Fourteenth Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary."

And yet, in this very case, where 90 per cent and more of the tonnage is timber, the rate is to be reduced to such an extent as to mean, of necessity, the destruction of the service. Again, as declared in that opinion:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to receive the money necessary for the proper discharge of its public duty."

And we have yet to find a financier who, when he found the carrier was deriving its revenue from a self-limited operation, would predicate a loan to that carrier upon the

theory that he would receive his payment, when that carrier was receiving from the self-limited tonnage but an interest return, without the creation of a capital reserve requisite to assure the return of the money initially invested. In short, no sane banker would lend his money to a self-limited operation whose property was being daily consumed in the use, when he was therefor to receive nothing but an interest return, and must know his principal would be lost, because his debtor was rendering a service upon a theory of perpetual existence when perpetual existence is impossible under the given factors of the case.

Note, also, *Wilcox v. Consolidated Gas Company,* 212 U. S., 19, 48-50; *Cedar Rapids Gas Co. v. Cedar Rapids,* 223 U. S., 655, 670; *Des Moines Gas Co. v. Des Moines,* 238 U. S., 153, 172; *Lincoln Gas, etc., Co. v. Lincoln,* 250 U. S., 256, 268.

In the Bluefield case, the interest return was held to be approximately 8 per cent with proper depreciation allowance. Now, if the investor is entitled to 8 per cent, it means 8 per cent with a return of the principal, not 8 per cent without a return of the principal, which would be true in the case at bar if the theory which we have herein shown to be correct is not adopted, and for the Commission to seek to admeasure a reasonable rate upon our line what is a reasonable rate upon a railroad line that will run forever is to seek to apply a yardstick in the admeasurement of unlimited distance.

A typical railroad operation serving an established country cannot be made the criterion for admeasuring a rate where the operation is self-limited. The greatest blessing of any country is a wise citizenship, capable and competent to take care of its own rights, and the fact that substantially

all of the timber in the territory in Mississippi from Norfield south to the Gulf has been cut and moved under this rate structure demonstrates that these citizens have naught whereof to complain. If, perchance, the tonnage was on the trunk line, it commanded a higher value. If, by the effort of the owner, it must be hauled to the trunk line, the owner reflected in the price which is paid the place disadvantage, and now, having reflected in the price paid the place disadvantage and therefor profited, he seeks to profit doubly by eliminating that wherefor he has now already received compensation by compelling this company to do that which, if he did himself, he would have to pay the same amount which this company now asks the right to exact therefor. Demanding from the timber shipper but the cost which the shipper must needs expend in overcoming place disadvantage found by the Commission to be reasonable—with deference—more than reasonable, we deny the right of such a shipper to destroy our autonomy—to compel us to serve at less than a reasonable rate because another, dissimilarly situated, has seen fit thus to do.

Point V.

CONVERTIBLE VALUE OF MONEY DEPRIVES APPELLEES OF PROPERTY UNCONSTITUTIONALLY, IF RELIEF GRANTED.

By the bill, it is averred:

> "Complainants aver that for the services rendered in the transportation of lumber at the present rates, with the convertible value of money, that the rate upon lumber is lower, and to further reduce it by the elimination of the arbitrary would be to deprive complainants of their property without due process

> of law and compel them to render a service for said shippers at a lower figure than that which, under the Constitution, they are entitled to exact, in view of the provisions of the transportation act."

The convertible value of money expresses its worth to the possessor. The rates had accordingly been fundamentally reduced, and thereby to compel these carriers to transport at this rate was to afford the public a service at a price far less than that originally fixed as reasonable therefor.

Point VI.

No Authority in Commission to Eliminate Arbitraries on Short Lines by Enactment of a Universal Order at July 2, 1919.

No order of the Commission can be made without evidence upon which to base it, and if so made, it is without validity. *Akron, etc., v. United States,* U. S. Sup. Court Adv. Op., 1923, page 316 The Commission was passing upon one single condition, namely: Discrimination at Knoxo, Mississippi, yet notwithstanding the evidence was confined exclusively to Knoxo, and the rate structure there obtaining, the Commission saw fit under this petition, without evidence other than that properly appertaining in this record, to announce a general rule destroying all arbitraries. This was beyond its power. *Southern Pacific Co. v. Commission,* 219 U. S., 433.

The extension of the power by the Transportation Act, with deference, did not validate an order predicated upon a petition filed before its passage, and as to which no

retroactive effect could be given, nor validate a proceeding wherein all of the evidence was confined to a time preceding the date of the order. The condition of this carrier was such as to preclude this course, and where, as pointed out, there were 95 short lines in this territory, of whom 82 pursued this policy, and only 13 did that which the Commission thought proper (and divers of these for special reasons), then it does not lie within the power of the Commission, without a general investigation, and under general evidence, by a five to three opinion, to announce general principles controlling throughout the Nation, and upturn the settled practice for many years upon hundreds of lines of road.

The seriousness of this controversy was not fully appreciated, with deference, by the Commission. Its theory of rate uniformity was attractive, but the price to be paid therefor is such as to preclude its adoption. With full assurance, therefore, we confidently assert that this carrier was entitled to name its own rate, and since that rate had been named for a period of over six years, it was then, contractually, agreed to by the sole petitioner. This contract was kept for nearly ten years, and it was only by reason of outside suggestion that its solemn obligation was sought to be subverted.

Upon the principles of common justice, we insist that the contract, as made, be carried out, and that Swift be compelled to pay the price which he agreed to pay.

Respectfully submitted,

MARCELLUS GREEN,
GARNER WYNN GREEN,
Solicitors for Fernwood, Columbia and Gulf Railroad Company.

9r

A copy of this brief was served by mail, postage prepaid, on the — day of ——, 1923, upon L. Palmer, Solicitor for Swift Lumber Company, 606 Commercial Place, New Orleans, La., and Hon. R. V. Fletcher, Solicitor for Illinois Central Railroad Company, Chicago, Ill., and by delivery to Hon. Blackburn Esterline, Special Assistant to the Attorney General, and Hon. J. Carter Fort, Solicitor of Interstate Commerce Commission.